IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 13128 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DHIRAJ GANDHRAPSINH

Versus

STATE OF GUJARAT

Appearance:

MS SUBHADRA G PATEL for Petitioner

MR RC KODEKAR, AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 11/05/2001

ORAL JUDGEMENT

1. Heard the learned advocate Ms. Subhadra Patel for the petitioner and Ld. AGP Mr. R.C. Kodekar for the respondent State.

2. In the present petition the petitioner has challenged the detention order dated 16/11/2000 passed by the Police Commissioner, Ahmedabad City under Section 3 (1) of the Gujarat Prevention of Anti Social Activities Act, 1985 (for short 'the PASA Act') under Article 226 of the Constitution of India.

3. The petitioner has been detained at Bhuj Jail and thereafter has been transferred to Porbandar Jail as Class-II detenu. The grounds of detention dated 16/11/2000 have been communicated and supplied to the petitioner u/S. 9(1) of the PASA Act. According to the grounds of detention in all 3 offences have been registered against the present petitioner in respect to sections 294, 114, 307, 324, 323, 294 of the Indian Penal Code. Last offence registered on 10/11/2000. According to the grounds of detention the present petitioner was released on bail in respect to the offence nos. 1 and 2 and in respect to offence no. 3 petitioner was in judicial custody. Therefore, at the time of passing of detention order the petitioner was in judicial custody. The two statements of the witnesses whose identity has not been disclosed, have been recorded by the concerned Police Inspector on 13/11/2000, 14/11/2000 and thereafter on 15/11/2000 and both statements have been verified by the detaining authority and on the next day the detention order dated 16/11/2000 has been passed by the detaining authority. The State Government has filed reply which has been taken on record.

4. Ms Subhadra Patel, learned advocate has submitted that there are various grounds mentioned in the present petition challenging the detention order. But according to the learned advocate two grounds are sufficient to vitiate the order of detention. The first ground submitted by the learned advocate is that at the time of passing of the detention order the present petitioner was in judicial custody. Therefore, it is the duty of the detaining authority to consider some cogent material before him about likelihood of petitioner to be released on regular bail and considering the grounds of detention there was no cogent material on record and the detaining authority has not applied its mind and mechanically the order of detention has been passed, which is not justified the subjective satisfaction of the detaining authority. The second ground which has been raised by the learned advocate is that the statement of witness whose identity has not been disclosed, has been verified by the detaining authority on 15/11/2000 and on the next day the detaining authority has passed the detention order in a mechanical manner which amounts to

non-application of mind.

5. Ld. A.G.P. Mr. Kodekar has submitted that affidavit in reply has been filed by the respondent State, but looking to the averments made therein, the detaining authority has applied the mind and genuineness of the witnesses has been examined and verified by the detaining authority and after having the subjective satisfaction ultimately there is no option for the detaining authority except to pass the detention order against the present petitioner, otherwise it will disturb the public order and peace. Therefore, according to the Ld. AGP the order of detention has been rightly passed and there is no illegality committed by the detaining authority while exercising the powers u/S. 3(1) of the PASA Act.

6. I have heard the learned advocates appearing on behalf of the respective parties. In respect to the first contention which is undisputed between the parties that at the time of passing the detention order the petitioner was in judicial and police custody. Therefore, it is a duty of the detaining authority to consider the fact that is there any likelihood of release of petitioner on bail or not? Or that some cogent material is necessary on record which is required for the subjective satisfaction of the detaining authority. In respect to the first contention, the view taken by the Apex Court in the case of Rameshbhai Yadav v/s. District Magistrate and ors. reported in 1985 S.C.C. (Criminal) 514 wherein the Apex Court has observed that merely on the ground that an accused in detention as an undertrial prisoner was likely to get bail and order of detention under National Security Act should not ordinarily be passed. If the apprehension of the detaining authority is true, the bail application was to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Recently the Apex Court in the case of Amritlal v/s. Union Government through Secretary, Ministry of Finance and ors. reported in [2001] 1 S.C.C. page 341 has observed that while passing the detention order the subjective satisfaction of the detaining authority must have to be established. When detenu already in jail, then detaining authority must be satisfied on the basis of available cogent material about likelihood of the detenu being released on bail and not merely about likelihood of his moving application for bail. In absence of such satisfaction, detention order cannot be sustained. Looking to the facts of the present case while considering the grounds of detention there was no cogent material before the

detaining authority which justify the likelihood of petitioner being released on regular bail. In the ground of detention merely apprehension of the detaining authority to the effect that the petitioner may apply for the regular bail, but there was no application filed by the petitioner before any competent Court for releasing him on regular bail. In absence of such cogent material the subjective satisfaction of the detaining authority is not established and, therefore, considering the observations made by the Apex Court in above referred two cases, according to my opinion, the order of detention is required to be quashed and set aside.

7. The second contention which has been raised by the learned advocate Ms. Patel that the statements of witnesses whose identity has not been disclosed have been verified by the detaining authority on 14/11/2000 and on the same day the detention order has been passed which amounts to exercising the powers in mechanical manner and it also amounts to non-application of mind by the detaining authority. She relied upon the decision of this Court in the case of Ranubhai B. Bharwad v. State reported in 2000 (3) G.L.R. page 2696. This Court made following observations :-

"After referring to Kalidas C. Kahar v. State of Gujarat, 1993 (2) GLR 1659 the Court observed:

The statements of the three witnesses in the instant case which were recorded before the Police Inspector on 17th August 1999, 21st August 1999 and 25th August 1999 with regard to the incidents dated 10th July 1999, 13th June 1999 and 26th June 1999 were the material along with the proposal which is said to have been made on 27th August 1999 and it is clear from the record that it was on 29th August 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority had considered the proposal dated 27th August 1999 at any time prior to 29th August 1999 and on 29th August 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafter on the following day, i.e., on 30th August 1999 the detention order has been passed.

The manner in which the verification has been

recorded of the statements made by these three witnesses for the purpose of section 9(2) shows that the same has been done only as an empty formality in asmuch as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever the statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege u/S. 9(2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division Bench that it is a case of wrong exercise of power u/S. 9(2) and it is established that in such cases, the wrong exercise of power u/S. 9(2) adversely affects the detenu's right of making an effective representation guaranteed under Article 22 (5) of the Constitution of India.

Once the materials are placed before the detaining authority with the proposal by the sponsoring authority, it must have reasonably sufficient time for the purpose of verification of the fact and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it also devoted sufficient time before arriving at the conclusion that the detenu was required to be detained immediately. In the facts of the present case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August 1999, i.e., on the next day to the date on which the materials were considered by the detaining authority."

8. In light of the observations made by this Court as well as by the Apex Court, according to my opinion the

order of detention is required to be quashed and set aside and the same is vitiated.

9. In the result, the present petition is succeeded and the order of detention dated 16/11/2000 is vitiated and is hereby quashed and set aside. The detenu - Dhiraj Gandhrapsinh Tomar who is presently detained at Porbandar Jail be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct service is permitted.

[H.K. RATHOD, J.]

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